



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-64,437-02

EX PARTE MARIO RASHAD SWAIN

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. 30,261-B IN THE 124TH DISTRICT COURT
GREGG COUNTY**

Per Curiam.

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In November 2003, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. On direct appeal, this Court affirmed applicant's conviction and sentence. *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005). Applicant filed his initial post-conviction application

for writ of habeas corpus in the convicting court on August 31, 2005. This Court denied applicant relief. *Ex parte Swain*, No. WR-64,437-01 (Tex. Crim. App. Sept. 20, 2006)(not designated for publication). This, applicant's first subsequent application, was filed in the trial court on October 31, 2012.

In his application, applicant raises a single claim that the testimony of A.P. Merillat was materially false and violated his constitutional rights. Applicant claims that this Court's opinions in *Estrada v. State*, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010) and *Velez v. State*, No. AP-76,051, slip op. at pp. 53-7 (Tex. Crim. App. June 13, 2012)(not designated for publication), provide new law supporting a review of his claim under Article 11.071, § 5(a)(1). He further asserts that the fact that the similarity of Merillat's testimony in those two cases to his testimony in this case meets the clear and convincing evidence standard allowing review under Article 11.071, § 5(a)(3).

We note, however, that applicant's offense and trial occurred prior to the effective date of the regulation that was the subject of Merillat's testimony in *Estrada* and *Velez*. Therefore, the holdings in these cases do not affect applicant's case. Likewise, applicant has failed to meet the dictates of Article 11.071, § 5(a)(3). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 2ND DAY OF NOVEMBER, 2012.

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